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IN THE

Supreme Court of the United States

October Term, 1964

No. 1075

WILLIAM J. [illegible], *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The basic issue presented for review in this case is quite different from what appears in the opposing brief of the United States. The Government suggests (Br., p. 2) that the prime question is whether the United States is liable under the Federal Tort Claims Act for the negligence of one "who is not its employee and who was not, either intentionally or negligently, made to appear to be a federal employee."

If that were truly the question involved, petitioner would not be before this Court at this time. Of course the Government is not liable for the acts of an individual who is not an employee or who was not made to appear as an employee. But what is in issue here is whether the Federal Tort Claims Act encompasses agency concepts within its definitions of federal employees and, if so, whether a court should use federal or state principles of agency in reviewing the evidence in a particular case. Those are the important matters that deserve review by this Court.

This delineation of the questions presented is not overcome by the Government's insistence (Br., p. 7) that the record does not present any question of ostensible agency and that there was no suggestion that petitioner believed Lt. Hammack to be an employee of the Club. The critical fact is that both the District Court and the Court of Appeals, despite repeated requests,[1] declined to make findings or to review the evidence in the light of agency concepts of employment. Indeed, the questions presented by petitioner for review by the Court of Appeals (Opening Brief, pp. 11-12) all dealt with the error of the District Court in declining to find or rule as to whether Lt. Hammack was the actual or ostensible agent of the Club and as to whether petitioner reasonably relied on that apparent authority.

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[1] The record reference (Tr. 221, 222), cited twice by the Government (Br., p. 6 and fn. 3, p. 7), to the fact that petitioner's counsel requested the District Court "to make a ruling on the issue of ostensible agency as created by Sergeant Graves in Lieutenant Hammack" belies the Government's suggestion (Br., p. 7) that the court was not requested to make findings on such aspects of the ostensible agency doctrine as whether petitioner acted in mistaken reliance on Hammack's capacity or whether he was justified in so doing.

That the Government disagrees (Br., p. 8) with the petitioner (Pet., p. 14) as to whether the record would permit a conclusion that Lt. Hammack was an ostensible agent or employee of the Club is not material to the issues presented to this Court. What is material is that the court below seemingly recognized that agency concepts are relevant in determining who is a federal employee—a proposition not here conceded by the Government—and yet failed to review the evidence in terms other than the formal employer-employee relationships.

If, as the Court of Appeals has said (Pet. App. 2a, fn. 2), the statutory reference to federal employees includes the terms "servant" or "agent" as used in the *respondeat superior* doctrine, then the ostensible agency principles of that doctrine should become operative. And the ostensible agents of the United States would thus fit within the statutory description (§ 2671) of those employees who are "acting on behalf of a federal agency, . . . temporarily . . . without compensation." Cf. *Martarano* v. *United States,* 231 F. Supp. 805, 307 (D. Md.). If that statutory analysis be correct, and once it is determined whether federal or state *respondeat superior* doctrines control in the difficult area of ostensible agency (see Petition, pp. 17-18),[2] then the case should be returned to the District Court for the proper assessment of the evidence in light of these controlling principles.

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[2] As indicated in the Petition, the glib dichotomy between the fact of employment being determined by federal law and the scope of employment being determined by state law may break down in the area of ostensible agency, making it necessary to apply only state law. See Pet., pp. 17-18.

The importance of this statutory problem is not to be gainsaid. True, there are no conflicting appellate decisions. But the importance of the problem was generated by the Court of Appeals below in its half-hearted recognition of the relevance of agency concepts in defining federal employees. Confusion and uncertainty will surely follow in this recurring area of litigation unless those agency concepts are more clearly enunciated by this Court.

The petition should therefore be granted.

Respectfully submitted,

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